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Supreme Court of the United States

OCTOBER TERM, A. D. 1950.

No. 558

FIRST NATIONAL BANK OF CHICAGO, AS EXECUTOR OF THE ESTATE OF JOHN LOUIS NELSON, DECEASED,

Petitioner,

VS.

UNITED AIR LINES, INC., A CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Summary and Short Statement of the Matter Involved.

This petition for Certiorari is sought *before judgment* in the Court of Appeals (Rule 39; Tit. 28, U. S. C. A. Sec. 1254). "Questions of gravity and importance"[1] are involved:

MAY THE PRINCIPLE OF *ERIE* v. *TOMPKINS* BE APPLIED TO DIVEST JURISDICTION OF A FEDERAL COURT SITTING IN ILLINOIS BY REASON OF A LOCAL STATUTE WHICH,

[1] *Forsyth* v. *Hammond*, 166 U. S. 506, 514.

ALTHOUGH CREATING AN ACTION FOR WRONGFUL DEATH, BARS JURISDICTION OF COURTS IN THE STATE TO ENTERTAIN LIKE ACTIONS CREATED BY LAWS OF SISTER STATES?

IS A PROVISION IN THE ILLINOIS WRONGFUL DEATH STATUTE WHICH DIVESTS ILLINOIS COURTS OF JURISDICTION TO ENTERTAIN SIMILAR ACTIONS CREATED BY LAWS OF SISTER STATES VIOLATIVE OF THE FULL FAITH AND CREDIT CLAUSE OF THE FEDERAL CONSTITUTION?[2]

The above questions quickly emerge from the facts, which are undisputed.

John Louis Nelson was killed in the Bryce Canyon, Utah, air crash disaster on October 24, 1947, while returning home to Chicago from Los Angeles as a passenger aboard Respondent's DC-6 airliner.[3] Petitioner, his executor, brought suit under the Utah death statute[4] against Respondent, a Delaware Corporation, in the District Court for the Northern District of Illinois, for the benefit of the surviving widow and children (R. 3, 4).

The Third Defense pleaded in Respondent's Answer set forth the following proviso to Section 2 of the Illinois Injuries Act:[5]

> "Provided, further, that no action shall be brought or prosecuted in this State to recover damages for a death occurring outside of this State where a right of

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[2] This question arising out of a similar provison in the Wisconsin Statute, but applying to an action brought in the *State* Court, is presently before this Court in *Hughes* v. *Fetter,* Docket No. 355. The instant case applies the full faith and credit clause to a local statute which has been construed under *Erie* v. *Thompkins* to deprive the Federal Court of jurisdiction.

[3] *Res ipsa loquitur* applies to actions for injuries from such a casualty. Cases collected in *Smith* v. *Penn. Central Airlines,* 76 Fed. Supp. 940.

[4] Section 104-3-11 UCA 1943.

[5] Ill. Rev. Stats. 1949, Ch. 70, pars. 1 and 2. This is a death statute enacted in 1853. Section 1 created a cause of action for wrongful death. Section 2 provided: in whose name the action should be brought; for whose benefit recovery was had; a limit on the amount of recovery; and the time within which suits must be commenced. The following proviso was added to Section 2 in 1903 (Ill. Laws 1903, p. 217): "Provided, further, that no action shall be brought or prosecuted in this State to recover damages for a death occurring outside of this State." This proviso was amended to its present form, quoted in the text, in 1935 (Ill. Laws 1935, p. 916).

> action for such death exists under the laws of the place where such death occurred and service of process in such suit may be had upon the defendant in such place."

It was alleged that Respondent was licensed to do business and had agents on whom process could be served in Utah where the injury and death occurred; and therefore the District Court in Illinois was barred from entertaining this suit. (R. 10) Petitioner moved to strike this defense on the ground that Federal jurisdiction could not be impaired by the Illinois statute. (R. 11)

When suit was filed, *Stephenson* v. *Grand Trunk W. R. Co.*, 110 Fed. 2nd 401 (CCA 7, 1940), was thought to express the law on the Third Defense. *Davidson* v. *Gardner*, 172 Fed. 2nd 188 (CCA 7, 1949), followed. Both held that the District Court's jurisdiction was not impaired by the Illinois statute.

In July 1950, the Court of Appeals reversed the two earlier decisions in *Trust Co. of Chicago* v. *Pennsylvania R. Co.*, 183 Fed. 2nd 640, 644, and held that the Illinois statute was a *jurisdictional bar* to the entertainment of an action for a foreign death by a Federal Court sitting in Illinois.[6] At this time both the Utah [7] and Illinois[8] statutes of limitation had run.

Petitioner then amended its motion to strike the Third Defense to present the constitutional questions presented here. In the alternative, a motion was made to transfer the case to the District Court in Utah under Section 1406(a) of the Judicial Code.[9] (R. 18, 19-22)[10]

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[6] *Munch* v. *United Air Lines, Inc.*, 184 Fed. 2nd 630, following the decision in *Trust Co. of Chicago*, was decided Nov. 1950. It involves the same accident in which Nelson was killed.

[7] Section 104-2-25 UCA 1943.

[8] Ill. Rev. Stats. 1949, Ch. 83, par. 15.

[9] Tit. 28, U. S. C. A., Sec. 1406 (a).

[10] See also earlier motions to strike. (R. 11-16)

The District Court overruled the amended motion to strike the Third Defense, finding:

(a) The Illinois statute deprives a Federal District Court in Illinois of jurisdiction to entertain a suit for a wrongful death occurring in Utah;

(b) The deprivation of jurisdiction thus caused by the Illinois statute is not in violation of Article III of the Federal Constitution;

(c) Said statute does not violate the full faith and credit clause of the Federal Constitution.

The alternative motion to transfer the suit to Utah was likewise denied, the Court finding *that venue was properly laid,* and since it was, Section 1406 (a) conferred no power to transfer the case; but, in any event, since there was no jurisdiction to entertain the suit, there was nothing before the Court to transfer.

Judgment was thereupon entered for the defendant. (R. 22-24). It is this judgment and the findings supporting it of which review is requested here.

Basis on which it is contended that this Court has Jurisdiction.

This Court's jurisdiction is invoked under Section 240 (a) of the Judicial Code (Tit. 28, U. S. C. A. Sec. 1254). Judgment in the District Court was entered January 26, 1951, and the appeal was filed and docketed in the Court of Appeals on February 5, 1951 (R. 22, 33-34). Cases supporting jurisdiction are: *Forsyth* v. *Hammond,* 166 U. S. 506, 513; *The Three Friends,* 166 U. S. 1; *American Const. Co.* v. *Jacksonville Ry.* 148 U. S. 372, 385; *St. Louis K. C. & C. R. R. Co.* v. *W. R. R. Co.,* 217 U. S. 247, 251; and *Gay* v. *Ruff,* 292 U. S. 25, 30.

The Questions Presented.

Jurisdiction of the District Court.

Is a construction of *Erie* v. *Tompkins* which divests jurisdiction of a Federal Court sitting in Illinois by reason of a provision in the local wrongful death statute barring jurisdiction of courts in the State to entertain actions for wrongful death created by sister States in violation of Article III of the Federal Constitution?

Is Federal jurisdiction in diversity cases, springing as it does from Article III of the Federal Constitution and the Acts of Congress authorized thereby, a Federal question in the determination of which the principle of *Erie* v. *Tompkins* has no application?

In applying the jurisdictional bar of a local statute to a foreign cause of action under the principle of *Erie* v. *Tompkins* in a diversity case, does a Federal Court adopt local policy as a substantive bar or defense to the cause of action, or does the local statute divest the Federal Court of power to entertain and hear the action?

Is the denial of jurisdiction to Illinois courts imposed by the statute in question a matter of practice and procedure, to which the doctrine of *Erie* v. *Tompkins* has no application; or is it a matter of substantive law to which such doctrine is applicable?

Full Faith and Credit.

Does Illinois have a governmental interest or public policy against foreign actions for wrongful death sufficient to justify denial of jurisdiction of its courts under the full faith and credit clause of the Federal Constitution?

Does the fact that Illinois has created and permits recourse to its courts upon actions for wrongful death

arising within its boundaries negate any permissible Illinois policy, within the narrow boundaries imposed by the full faith and credit clause, to justify denial of jurisdiction to like actions created by laws of sister States?

On the Alternative Motion to Transfer.

If under *Erie* v. *Tompkins* a state statute barring jurisdiction of its courts to certain foreign actions likewise bars jurisdiction of the Federal District Court within that State may such Federal Court transfer the case to a Federal Court sitting where the cause of action arose under Section 1406 (a) of the Judicial Code?

Reasons Relied upon for the Allowance of the Writ

Why writ is sought before judgment.

The writ is sought here *before judgment or decision* of the Court of Appeals. The reason is apparent. Two substantial constitutional questions are involved. The first has been adversely determined by the Court of Appeals for the Seventh Circuit in *Trust Company of Chicago* v. *Pennsylvania R. Co.*, 183 Fed. 2nd 640 (July 1950), and *Munch* v. *United Air Lines, Inc.*, 184 Fed. 2nd, 630 (Nov. 1950). Those holdings were thought to be compelled by the decisions of this Court. For this reason it would be a useless gesture for Petitioner to ask that Court to reconsider, absent further expression by this Court. The second of these questions (not raised before the Court of Appeals in the two cases above) is already before this Court, viewed from a different aspect, in *Hughes, Adm.* v. *Fetter*, Docket No. 355, this Term.

Reasons why this Petition should be granted as to each question are set forth below.

Jurisdiction of the District Court.

Article III of the Constitution. There is a substantial body of law decided by this Court holding that a State statute cannot in any way impair, limit, abridge, destroy or enlarge the jurisdiction of a Federal Court in diversity as well as other cases. The basis of these decisions is that Article III of the Federal Constitution was a grant of judicial power by the States to the Federal Government, including jurisdiction in diversity cases, and that Congress, having conferred such jurisdiction on the District Courts pursuant to constitutional authority, any limitation, impairment, abridgement, destruction or enlargement of that jurisdiction by the States is a violation of Article III. The judgment and findings of the trial Court here and the decisions of the Court of Appeals in *Trust Co. of Chicago* v. *Pennsylvania R. Co.*, 183 Fed. 2nd 640, 644, and *Munch* v. *United Air Lines, Inc.*, 184 Fed. 2nd 630, apply the principle of *Erie* v. *Tompkins* so as to cause the statute here to have the effect of destroying Federal jurisdiction in this case in violation of Article III of the Constitution of the United States.

That this is not and cannot be the law is readily demonstrated by the fact that Federal jurisdiction in diversity cases is conferred by Congress under express authority of Article III; and thereby is a *Federal* question in the determination of which the principle of *Erie* v. *Tompkins* cannot apply.

These are questions whose prompt settlement by this Court is in the public interest. They are Federal questions of tremendous import which have not been clearly determined by this Court.

Substantive law or procedure. In view of the fact that Federal jurisdiction is impregnable from destruction or

diminution by State law, it appears crystal clear that this Court's expression on the subject in *Angel* v. *Bullington*, 330 U. S. 183, 191, 192, was on the theory that a Federal Court, in giving effect to local policy as expressed in a local statute, even though it bars jurisdiction of local courts, does so by way of imposing the policy so expressed as a substantive bar or defense to a cause of action pending before it, but not a jurisdictional bar.

The one is a matter of substantive law, applying the local rule on conflicts to a cause of action created elsewhere, considered immoral or against the governmental interest or policy of the forum; the other is a question of power of local courts—the remedy afforded—a question of practice and procedure to which the principle of *Erie* v. *Tompkins* does not apply.

These are questions of utmost importance which should be decided by this Court.

Full faith and credit.

This case views the validity of a state statute, denying jurisdiction to actions for wrongful death created by laws of sister States, from an angle different than presented in *Hughes, Adm.* v. *Fetter*, pending as Docket No. 355, namely, as such statute affects the jurisdiction of a Federal Court under the rapidly multiplying progeny of *Erie* v. *Tompkins*.

This case can supply, in part, an answer to the question of full faith and credit left undecided in *Angel* v. *Bullington*, 330 U. S. 183, the underlying question which divided this Court, as it was then constituted, six to three. But this case presents full faith and credit in clearer focus than *Angel* v. *Bullington*, since here there is not the social evil of deficiency judgments (with which everyone having practiced law in the thirties is familiar) to support the governmental interest or policy of the State.

It, with *Hughes, Adm.* v. *Fetter,* presents for the first time the question whether a State's governmental interest or policy in denying access to its courts to enforce actions created by laws of sister states, is sufficient under full faith and credit, where access is granted to enforce like actions created by the laws of that State, indeed by the very statute creating the bar.

The Courts of Illinois have held that the statute in question does not contravene the full faith and credit clause. This Court is the final arbiter of that question, but has never been called upon to decide it. Because Illinois is one of the most populous States in the Union, because of present day wide-spread travel of its citizens with attendant hazard often resulting in death, and because of similar statutes in other states whose citizens likewise undergo hazards while traveling, this question is one of utmost importance and should be finally determined by this Court.

Motion to Transfer under Section 1406 (a).

If this Court holds that a State statute, such as the one here, can impair jurisdiction of a Federal District Court, there doubtless will be literally thousands of deserving litigants stranded and left high and dry in District Courts bereft of jurisdiction, with statutes of limitation having expired. Unless there is found some machinery for transfer of such actions to a proper forum, great injustice will be done. Whether section 1406 (a) of the Judicial Code (28 USCA Sec. 1406 (a)) provides such machinery is here before this Court. This involves a question of public interest which will be promoted by prompt settlement of the question.

Prayer for Certiorari.

Wherefore Petitioner, for the reasons outlined above as amplified by the Brief in support of this petition which follows, prays that this Court grant its writ of *certiorari* to review the proceedings below.

First National Bank of Chicago,
as executor of the Estate of
JOHN LOUIS NELSON, deceased,
Petitioner.

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BRIEF.

I.

The Illinois Statute cannot deprive the Federal Court of jurisdiction under the principle of Erie v. Tompkins.

A. Such an effect would violate Article III of the Constitution of the United States.

1. The jurisdiction of a Federal District Court in diversity cases—its *power* to hear and determine controversies—springs from Article III of the Federal Constitution and the enactments of Congress authorized thereby. Section 1 of Article III provides:

> "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish * * *"

Section 2 of Article III provides, in part:

> "The Judicial power shall extend to all cases in Law and Equity, arising under this Constitution, the Laws of the United States, and treaties made, or which shall be made under their authority; * * *"

Section 2 further provides that the judicial power thus granted the Federal Government extends to:

> "Controversies * * * between citizens of different States * * *"

This Court speaking through Justice Story in *Martin* v. *Hunter,* 14 U. S. 141, 154, 155, held that in those cases enumerated in Section 2 where the phrase "all cases" was used (such as those arising under the Constitution, Federal Laws, treaties, and admiralty), Federal jurisdiction was exclusive; but in respect to the other class where the word

"all" was omitted, such as diversity cases, Congress might qualify the jurisdiction of Federal Courts as public policy dictated. It was there declared (p. 156):

> "But, even admitting that the language of the Constitution is not mandatory, and that Congress may constitutionally omit to vest the jurisdictional power in Courts of the United States, it cannot be denied, that when it is vested, it may be exercised to the utmost constitutional extent."

Pursuant to the authority conferred by Article III, Congress has created District Courts, and pronounced:

> "(a) The District Courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $3,000.00 exclusive of interest and costs and is between:
>
> 1. Citizens of different States.
>
> * * *" (28 U.S.C.A. Sec. 1332).

Thus it is seen: (1) That where constitutional questions and questions arising under Acts of Congress are involved, the judicial power of Federal Courts is paramount and exclusive; (2) That the judicial power—jurisdiction—conferred upon Federal District Courts in diversity cases springs from Article III of the Constitution and from Acts of Congress authorized thereby, and the determination of this jurisdiction is for Federal Courts, unhampered by anything a State may do.

It also goes without saying that no State action can in any way limit, abridge or destroy this jurisdiction. The conferring of jurisdiction having sprung from the Constitution and laws of the United States, it cannot be destroyed, limited, abridged, or enlarged by anything a State may do. To this effect have been the uniform and unbroken holdings[1] of this Court since adoption of the Fed-

[1] From the many cases expressing this principle, we have culled those wherein the situation was such that *Erie* v. *Tompkins* would now sup-

eral Constitution. *U. S.* v. *Peters,* 9 U. S. 115, 136; 5 Cranch 65, 77 (Marshall, J.); *The Orleans,* 36 U. S. 138, 144; 11 Pet. 175, 184; *Gordon* v. *Longest,* 41 U. S. 63, 67, 68; 16 Pet. 97, 103, 104; *Union Bk.* v. *Jolly's Admrs.,* 59 U. S. 503, 507 (18 How.); *Hyde* v. *Stone,* 61 U. S. 170, 175 (20 How.); *Cowles* v. *Mercer County,* 74 U. S. 118 (7 Wall.); *Payne* v. *Hook,* 74 U. S. 425, 430 (7 Wall.); *The Belfast,* 74 U. S. 624; *Railway Co.* v. *Whitton,* 80 U. S. 270, 285-287 (13 Wall.); *Insurance Co.* v. *Dunn,* 86 U. S. 214, 223, 224, 226; *Insurance Co.* v. *Morse,* 87 U. S. 445, 453, 454, 458 (20 Wall.); *Hess* v. *Reynolds,* 113 U. S. 73, 77; *Barron* v. *Burnside,* 121 U. S. 186, 198, 200; *Lincoln County* v. *Luming,* 133 U. S. 529, 531; *Southern Pac. Co.* v. *Denton,* 146 U. S. 202, 207; *Chicot County* v. *Sherwood,* 148 U. S. 529, 533, 534; *Barrow Steamship Co.* v. *Kane,* 170 U. S. 100, 112; *Mississippi Mills* v. *Cohn,* 150 U. S. 202, 204, 205; *Western Union* v. *Kansas,* 216 U. S. 1, 35, 36; *Herndon* v. *Chicago Rock Island & Pacific Ry. Co.,* 218 U. S. 135, 158; *Harrison* v. *St. Louis,* 232 U. S. 318, 328; *Wisconsin* v. *Philadelphia & Reading Coal Co.,* 241 U. S. 329, 333; *Terral* v. *Burke Const. Co.,* 257 U. S. 529, 532; *Mason* v. *United States,* 260 U. S. 545, 557; *Pusey & Jones* v. *Hanssen,* 261 U. S. 491, 497, 498; *Matthews* v. *Rogers,* 284 U. S. 521, 529; *Stratton* v. *St. L S W Ry. Co.,* 284 U. S. 530, 533; *Penn. Co.* v. *Pennsylvania,* 294 U. S. 189, 197; *Kelleam* v. *Md. Cas. Co.,* 312 U. S. 377, 381, 382; *Burford* v. *Sun Oil Co.,* 319 U. S. 315, 317, note 3, and see 130 Fed. 2nd 10, 17, approved 319 U. S. 317; *Guaranty Trust Co.* v. *York,* 326 U. S. 99, 103-106; *Holmberg* v. *Armbrecht,* 327 U. S. 392, 394.

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ply a defense based upon State law. *Wilson* v. *Tarpley,* 59 U. S. 517; *Kearey* v. *Farmers & M. Bk.,* 41 U. S. 88, 16 Pet.; *Suydam* v. *Broadnax,* 39 U. S. 55, 14 Pet 67; *Beers* v. *Houghton,* 34 U. S. 215, 9 Pet. 329; *Ex Parte Schallenberger,* 96 U. S. 369, 377; *Smith* v. *Railroad Co.,* 99 U. S. 398, 401; *Ex Parte McNiel,* 80 U. S. 236, 243; *Reynolds* v. *Crawfordsville Bank,* 112 U. S. 405, 410; *Herron* v. *Southern Pacific,* 283 U. S. 91.

In *Harrison* v. *St. Louis, etc., Ry. Co.*, 232 U. S. 318, 328, the rule was thus stated:

> "It may not be doubted that the judicial power of the United States as created by the Constitution and provided for by Congress pursuant to its constitutional authority, is a power wholly independent of state action and which therefore the several states may not by any exertion of authority in any form, directly or indirectly, destroy, abridge, limit or render inefficacious. This doctrine is so elementary as to require no citation of authority to sustain it. Indeed, it stands out so plainly as one of the essential and fundamental conceptions upon which our constitutional system rests, and the lines which define it are so broad and so obvious, that, unlike some of the other powers delegated by the Constitution, where the lines of distinction are less clearly defined, the attempts to transgress or forget them have been so infrequent as to call for few occasions for their statement and application."

The Court of Appeals for the Seventh Circuit in *Trust Company of Chicago* v. *Pennsylvania R. Co.*, 183 F. 2nd 640, 644, and *Munch* v. *United Air Lines*, 184 F. 2nd 630, and the trial Court here, following those two decisions (R. 22-24), have construed *Erie* v. *Tompkins*, 304 U. S. 64, so as to cause the Illinois statute to divest the Federal Court of jurisdiction. By such holdings they permit State action to destroy and render inefficacious judicial power of the United States as granted by the Constitution and provided for by Congress pursuant to its constitutional authority.

Their holdings are clearly a violation of Article III of the Constitution of the United States in permitting State action to impair and destroy Federal jurisdiction.

2. Another fallacy in such a construction of *Erie* v. *Tompkins* already has been touched upon. It involves the same fundamental grounds. Jurisdiction of a Federal Court in diversity cases springs from the judicial power

of the United States as granted by Article III and as provided for by Congress pursuant to its constitutional authority. This brings the determination of that question within the first clause of Section 2 of Article III wherein Federal judicial power extends to *all cases* arising under the Constitution and the laws of the United States; and makes it one whose ultimate disposition may be made only by Federal Courts. This is an area in which *Erie* v. *Tompkins* can have no application. *Urie* v. *Thompson*, 337 U. S. 160, 174; *Holmberg* v. *Armbrecht*, 327 U. S. 392, 394. Every Federal question, "necessarily including that of its own jurisdiction, must be decided in the Federal Court." *Insurance Co.* v. *Morse*, 87 U. S. 445, 454; *Insurance Co.* v. *Dunn*, 86 U. S. 214, 223; *Gordon* v. *Longest*, 16 Pet. 97, 103, 104.

To permit the principle of *Erie* v. *Tompkins* to govern determination of Federal jurisdiction, itself a Federal question arising under the Constitution and Acts of Congress, is violative of Article III of the Constitution of the United States.

B. Angel v. Bullington, 330 U. S. 183, and Woods v. Interstate Realty Co., 337 U. S. 535, do not justify any such conclusion.

The holdings of the Court of Appeals in *Trust Company of Chicago* v. *Pennsylvania R. Co.*, 183 F. 2nd 640, 644, and *Munch* v. *United Air Lines*, 184 F. 2nd 630, were thought by that Court to be compelled by this Court's decisions applying the principle of *Erie* v. *Tompkins* in *Angel* v. *Bullington*, 330 U. S. 183, 191, 192, and *Woods* v. *Interstate Realty Co.*, 337 U. S. 535, 537, 538.

1. To attribute to those cases a construction of *Erie* v. *Tompkins* which destroys the clear and implicit grant of judicial power by Article III is untenable. Scarcely more

than a page was devoted to the question in *Angel;*[2] and in *Woods* scarcely two pages. It was not with such casualness that this Court overturned *Swift* v. *Tyson,* 16 Pet. 1, and the substantial body of law based on that decision. Nor did this Court find it so easy to distinguish *Hepburn & Dundas* v. *Ellzey,* 2 Cranch. 445, in *Nat. Mutual Ins. Co.* v. *Tide Water T. Co.,* 337 U. S. 582, holding that citizens of the District of Columbia were entitled to the same access to Federal Courts as are citizens of States. Both *Erie* and *National Mutual* involved the concepts of the grant of judicial power made by Article III involved here, but in neither of them were the constitutional questions as easily discernable nor so obvious and apparent. For this very reason, if for none other, it seems too clear for argument that this Court did not intend in *Angel* v. *Bullington* and *Woods* v. *Interstate Realty Co.* to overthrow the great body of law holding Federal jurisdiction impregnable against State action, as the Court of Appeals and the Trial Court have done.

No such justification is afforded by the principle of *Erie* v. *Tompkins,* as subsequently interpreted by this Court; and the fundamental concept of the foundation case refutes any such construction.

That case, distilled to its essence, simply holds that under the grant of judicial power made by Article III, the States did not surrender the right of their courts or legislatures to make or expound law, not involving Federal questions, affecting their citizens; and that the States had the right to have their citizens governed in this area by their own laws and decisions of their own courts. It followed that

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2 Only two cases were cited, *Lupton's Sons Co.* v. *Automobile Club,* 225 U. S. 489, and *Suydam v. Broadnax,* 14 Pet. 67, 75. Both these are cases to which (as shown in the margin on page 12, *supra,* note [1]) *Erie* v. *Tompkins* would apply today in supplying a defense provided by State law.

in diversity cases, where Federal questions were not involved, Federal Courts were obliged to follow the law as so determined and evolved. This result was reached on a constitutional ground as fundamental, but no more so, than those outlined in Point I-A, *supra.* The right of States under *Erie* v. *Tompkins* is a reserved power, not granted by Article III. Judicial power *granted* by Article III includes jurisdiction in diversity cases. The granted power cannot usurp the reserved power; nor can the reserved power affect the granted power. Nothing in *Erie* v. *Tompkins* or in any of its numerous progeny in the slightest degree attempted to cut down the clear and implicit grant of jurisdiction in diversity cases conferred by Article III. Such a construction of *Angel* and *Woods* is untenable.

2. Having in mind the constitutional foundation[3] on which jurisdiction in diversity cases rests, the meaning of this Court's decision in *Angel* v. *Bullington* emerges with startling clarity, once that decision is given more than superficial study. That decision does not (nor can it) permit a state statute to impinge upon the constitutional jurisdiction of the Federal Court. *What it does is adopt State policy, expressed by the statute, as a defense or substantive bar to a cause of action created elsewhere which is counter to that expressed policy.*

A simple analogy is illustrative. Illinois has a strong public policy against gambling. This is expressed by many criminal statutes against the evil, by creating *qui tam* actions for recovery of gambling losses, and similar enactments. Suppose a gambling debt created in Nevada where such actions are enforcible, and a suit to recover that debt on diversity grounds in a District Court in Illinois. Of

[3] It was fresh in the minds of this Court, by reason of the related questions clearly explained in *Guaranty Trust Co.* v. *York,* 326 U. S. 99, 103-106, and *Holmberg* v. *Armbrecht,* 327 U. S. 392, 394.

course the District Court would not enforce the action. Why? Because it would adopt Illinois' policy against enforcement of such a debt under *Erie* v. *Tompkins*. In doing so Illinois' policy would impose a defense or substantive bar to the action.

Now suppose that Illinois' policy against gambling was expressed in a statute *barring jurisdiction* of its courts to enforce any type of a gambling debt. There is little doubt that such enactment would be within the narrow boundaries of local policy imposed by the full faith and credit clause. If under such circumstances the Nevada action were filed in a Federal Court in Illinois, would the Federal Court be deprived of jurisdiction, or would it again adopt Illinois' policy as a defense or substantive bar to the Nevada action? The latter must be the answer. This is so, particularly in view of the constitutional barrier against impairment of Federal jurisdiction by State action. A statute imposing a jurisdictional bar would be nonetheless clearly expressive of Illinois' policy, as much so as a criminal law forbidding gambling, or a statute creating a *qui tam* action. No citation of authority is necessary in support of the assertion that the policy of a State is to be determined by its Constitution, its statutes, or by the decisions of its courts. What is applied, under *Erie* v. *Tompkins* in such cases, is State policy *no matter how that policy be expressed.*

So in *Angel* v. *Bullington*, the State policy against deficiency judgments was expressed in a statute depriving courts in North Carolina of power to hear or entertain such actions. What this Court determined was that, if such North Carolina policy was permissible under the full faith and credit clause (and Bullington was foreclosed on this question by the determination of the North Carolina Supreme Court), then a Federal Court in North Carolina was

bound under *Erie* v. *Tompkins* to apply North Carolina policy *as a defense or substantive bar* to such a cause of action.

3. Even if the principle of *Erie* v. *Tompkins* were pertinent to the question of the jurisdiction of the Federal Court here, its proper application would not justify the conclusions of the Court of Appeals and of the Trial Court below. The Illinois statute, barring jurisdiction to Illinois courts, involves a *local* question of practice and procedure, and not one of substance. And this Court has often held that to practice and procedure in the Federal courts *Erie* v. *Tompkins* does not apply. *Cohen* v. *Beneficial Loan Co.*, 337 U. S. 541, 555; *Ragan* v. *Merchants Transfer Co.*, 337 U. S. 530, 533.

In *Bradford Electric Co.* v. *Clapper*, 286 U. S. 145, 160, this Court, speaking through Mr. Justice Brandeis, held:

> "A state may, on occasion, decline to enforce a foreign cause of action. *In doing so, it merely denies a remedy, leaving unimpaired the plaintiff's substantive right, so that he is free to enforce it elsewhere.*" (Italics ours.)

In *Mason* v. *United States*, 260 U. S. 545, 558, it was stated:

> "But these decisions relate to the practice, *the impairing of jurisdiction*, rather than to the determination of the rights of parties after jurisdiction has been acquired." (Italics ours.)

And in *Kelleam* v. *Maryland Casualty Company*, 312 U. S. 377, 382, it was held (and this subsequent to *Erie* v. *Tompkins*):

> "• • • a remedial right to proceed in a federal court sitting in equity cannot be enlarged by a state statute."

In *Fauntleroy* v. *Lum*, 210 U. S. 230, 234, 235, Mr. Justice Holmes spoke for the Court, and said:

> "No doubt it sometimes may be difficult to decide whether certain words in a statute are directed to *jurisdiction* or to *merits*, but the distinction between the two is plain. One goes to the *power*, the other only to the *duty*, of the court. Under the common law it is the *duty* of a court of general jurisdiction not to enter a judgment upon a parol promise made without consideration; but it has the *power* to do it * * *". (Italics ours.)

The Illinois courts, in construing the instant statute, confirm the viewpoint that denial of jurisdiction to Illinois courts is simply a matter of practice and procedure. In *Walton* v. *Pryor*, 276 Ill. 563, 569, it is held:

> "There is a clear distinction, however, between creating a cause of action and providing for its enforcement, which must be in a court having jurisdiction to hear whether the cause of action has arisen. The legal right comes into existence by the enactment of the law, but the remedy is provided by the establishment of courts and bestowing upon them jurisdiction."

"Matters of 'substance' and matters of 'procedure' are much talked about in the books as though they defined a great divide cutting across the whole domain of law. But, of course, 'substance' and 'procedure' are the same keywords to very different problems. Neither 'substance' nor 'procedure' represents the same invariants. Each employs different variables depending upon the particular problem for which it is used. See *Home Ins. Co.* v. *Dick*, 281 U. S. 397, 409." *Guaranty Trust Co.* v. *York*, 226 U. S. 99, 108.

So here, the only permissible application of *Erie* v. *Tompkins* in applying a State's policy is to matters of substantive law. Local deprivation of jurisdiction is a matter of remedy and of practice and procedure to which the principle of that case does not apply.

4. It is all too obvious that there is language in *Woods* v. *Interstate Realty Co.* and *Angel* v. *Bullington* which led

the Court of Appeals to the conclusions it reached in *Trust Company of Chicago* v. *Pennsylvania R. Co.* and *Munch* v. *United Air Lines.* It little becomes us as practitioners to lecture this Court as to its employment of language or its manner of expression. Consequently we approach this part of our brief with full awareness of the respect this Court is entitled to be accorded not only by reason of the high position its members occupy but also because of the great abilities of which they are possessed.

It is with such respect that we assert the use of the phrase "diversity jurisdiction" in both cases was unfortunate. *Both had to do with local statutes barring jurisdiction of local courts. Woods* said, p. 538: "that for purposes of diversity jurisdiction a Federal Court is, 'in effect, only another court of the State.'" This paraphrased the following expression from *Guaranty Trust Company* v. *York,* 326 U. S. 99, 108: "But since a federal court adjudicating a State-created right solely because of the diversity of citizenship of the parties is for that purpose, in effect, only another Court of the State, it cannot afford recovery if the right to recover is made unavailable by the State • • •" It is seen that *Woods* substituted the phrase "for purposes of diversity jurisdiction", for the language, "a Federal Court adjudicating a State-created right solely because of the diversity of citizenship of the parties", used in *York.* The phrase "diversity jurisdiction" was borrowed from *Angel,* pp. 187, 191, 192.

It is plain that the phrase "diversity jurisdiction", as thus used, is employed to differentiate those cases in which a State-created right of action is involved, from cases in which a Federal right is involved.[3] In the one

[3] See *Holmberg* v. *Armbrecht,* 327 U. S. 392, 394. "But in the *York* case we pointed out with almost wearisome reiteration, in reaching this result, that we were there concerned solely with State-created rights. For purposes of diversity suits a federal court is, in effect, 'only an-

Erie v. *Tompkins* applies. In the other it does not. Yet because of this one unfortunate phrase in both *Woods* and *Angel, cases where State statutes were involved barring jurisdiction,* anyone reading the phrase was prone to reach the conclusion that *Erie* v. *Tompkins* could cause a State statute to bar constitutionally conferred jurisdiction of the Federal Court.

Therein, we submit, lies the reason for the Court of Appeals' decisions overturning the great body of law based on fundamental concepts under Article III, that State action can in no way, directly or indirectly, impair Federal jurisdiction.

II.

The Illinois statute is void as being counter to the full faith and credit clause, Section 1, Article IV of the Constitution of the United States.

1. The Utah statute here sued upon is set forth *verbatim* in an Appendix. It is modeled after Lord Campbell's Act.[4] Most of the States have death statutes of this type.[5] Illinois is one of these.[6]

While a cause of action for wrongful death comes into being by reason of the statute of the State where the wrong is committed, it is a transitory action and may be enforced wherever the defendant may be found (*Dennick* v. *Railroad Co.,* 103 U. S. 11, 17), unless in substance inconsistent with the public policy of the State in which the right of action

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other court of the State'. The considerations that urge adjudication by the same law in all cases within a State when enforcing a right created by that State are hardly relevant for determining the rules which bar enforcement of an equitable right created not by a State legislature but by Congress."

[4] 9 & 10 Vict. ch. 93.

[5] 17 C. J. 1185, note 34.

[6] Ill. Rev. Stats. 1949, ch. 70, pars. 1 and 2.

is sought to be enforced. *Stewart* v. *Baltimore & Ohio R. Co.*, 168 U. S. 445, 448, 449; *Slater* v. *Mexican National R. R. Co.*, 194 U. S. 120, 126; *A. T. & S. Fe* v. *Sowers*, 213 U. S. 55, 67.

Such a cause of action is entitled to be enforced under the full faith and credit clause of the Federal Constitution. Statutes are "public Acts" within the meaning of that provision. *Tennessee Coal Co.* v. *George*, 233 U. S. 354, 361; *Bradford Electric Co.* v. *Clapper*, 286 U. S. 145, 154, 155.

2. The purpose of the full faith and credit clause was to alter the status of the several states as independent foreign sovereignties, free to ignore the laws of the others, and to make them integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right, irrespective of the state of its origin. *Milwaukee County* v. *White Co.*, 296 U. S. 268, 277; *Magnolia Petroleum Co.* v. *Hunt*, 320 U. S. 430, 439.

The constitutional limitation imposed by the full faith and credit clause abolished, in large measure, the general principle of international law by which local policy is permitted to dominate the rules of comity. (*Broderick* v. *Rosner*, 294 U. S. 629, 642, 643; *Angel* v. *Bullington*, 330 U. S. 183, 188.) It has been held time and again that the power of a State to determine the limits of the jurisdiction of its courts and the character of the controversies which shall be heard in them is subject to the restrictions imposed by the Federal Constitution. *McKnett* v. *St. Louis & S. F. R. Co.*, 292 U. S. 230, 233;[7] *Broderick* v. *Rosner*, 294 U. S. 629, 642; *Angel* v. *Bullington*, 330 U. S. 183, 188. A State "cannot escape its constitutional obligations by the simple device of denying jurisdiction in such cases to courts other-

[7] Compare *Walton* v. *Pryor*, 276 Ill. 563. It would appear that the Illinois Statute is void as denying access to Federal Employees' Liability death cases.

wise competent." *Kenney* v. *Supreme Lodge,* 252 U. S. 411, 415; *Broderick* v. *Rosner,* 294 U. S. 629, 643; *Angel* v. *Bullington,* 230 U. S. 183, 188.

This area in which a State may cut down rights otherwise guaranteed by the full faith and credit clause is narrow and confined. *Broderick* v. *Rosner,* 294 U. S. 629, 642, 643; *Angel* v. *Bullington,* 330 U. S. 183, 188.

3. Just how extensive is this permissive area in which a State may bar the doors of its courts to foreign actions? The reason for it is succinctly stated in *Pink* v. *A. A. A. Highway Express,* 314 U. S. 201, 210:

> "But the very nature of the Federal union of States, to each of which is reserved the sovereign right to make its own laws, precludes resort to the Constitution as the means for compelling one State wholly to subordinate its own laws and policy concerning its peculiarly domestic affairs to the laws and policy of others."

In *Alaska Packers Ass'n.* v. *Industrial Comm'n.,* 294 U. S. 532, 547, the test was stated that a State statute could have no greater force abroad than full faith and credit permits it to have at home. In other words, the bar imposed locally to a foreign-created right must be justified by laws governing or regulating strictly internal affairs, matters in the regulation of which the several States reserved the power to deal under the Federal Constitution. This case involved a workman's compensation act of California, the forum, under a contract of employment entered into there where the injury occurred in Alaska. California's policy was enforced (p. 549) on the ground that she had a paramount interest because of the relationship of employee and employer created there.[8]

[8] Compare *Bradford Electric* v. *Clapper,* 286 U. S. 145, 153, where the interest of the state of employment was held paramount to that of the forum where the injury occurred.

So it is plain that only in the regulation of peculiarly domestic affairs of a State can the policy so expressed bar enforcement of actions created elsewhere. The State must have expressed such a strong interest internally, and have reasonable basis for such expression, that recognition of the foreign action would infringe its own essential sovereignty and impair its own right of regulation in that area.

The determination of this question is for this Court. *Angel* v. *Bullington*,[9] 330 U. S. 183, 189; *Pink* v. *A. A. A. Highway Express*, 314 U. S. 201, 210; *Alaska Packers Ass'n.* v. *Comm'n.*, 294 U. S. 532, 547.

4. Illinois has no such interest here. Its courts have repeatedly stated (*C. & E. I. R. R. Co.* v. *Rouse*, 178 Ill. 132, 139; *Dougherty* v. *American McKenna Co.*, 255 Ill. 369, 372; *Wall* v. *Chesapeake & Ohio Ry. Co.*, 290 Ill. 227, 233) that Illinois has no policy against foreign actions for wrongful death except as expressed by the instant statute. And Illinois has held that this statute does not violate the full faith and credit clause. *Dougherty* v. *American McKenna Co.*, 255 Ill. 369, 361, 372.[10]

[9] The full faith and credit question was left undetermined in *Angel* v. *Bullington*, 330 U. S. 183. Yet a comparison of the reason for governmental interest or policy in that case with that here shows that North Carolina had far greater justification in barring the door of its courts to actions for deficiency judgments than Illinois has in imposing a like bar to actions for foreign deaths. *North Carolina did not permit her own courts to entertain such actions where such actions arose within the State.* There is strong ground for argument that collection of deficiency judgments on real estate purchases, where the property purchased itself affords security for the debt, is a social evil. Those of us who practiced law in the thirties who witnessed the hardship and disaster brought about by devaluation of real estate during that era would be the first to recognize the validity of such an argument. But Illinois, by creating such causes of action and lending its courts for their enforcement where the injuries occur within the state, has recognized the social desirability of such recoveries; and it cannot bar its courts under full faith and credit to like actions created elsewhere.

[10] This case relied upon *Chambers* v. *B & O RR Co.*, 207 U. S. 142, 148, 154 involving the privileges and immunties clause, a five to three decision, Mr. Justice Holmes specially concurring, where the following language was approved by the full Court:

"In the decision of the merits of the case there are some fundamental principles which are of controlling effect. The right to sue and defend

Two of the most eminent jurists in this Nation's history, Mr. Justice Holmes and Mr. Justice Cardozo, have expressed themselves on this subject. While no local statute barring foreign death actions was there involved, this Court in *Slater* v. *Mexican Nat. R. R. Co.*, 194 U. S. 120, 126, speaking through Mr. Justice Holmes, declared:

> "As Texas has statutes which give an action for wrongfully causing death, of course there is no general[11] objection of policy to enforcing such liability there, although it arose in another jurisdiction. *Stewart* v. *Baltimore & Ohio R. R.*, 168 U. S. 445."

This principle was quoted with approval in *A. T. & S. Fe* v. *Sowers*, 213 U. S. 55, 67.

In *Loucks* v. *Standard Oil Co.*, 224 N. Y. 99, 120 N. E. 198, 201, an action for a wrongful death in Massachusetts brought in New York, Mr. Justice Cardozo, then speaking for the Court of Appeals, held:

> "Similarity of legislation has indeed this importance; its presence shows *beyond question that the foreign statute does not offend the local policy.*" (Italics ours.)

In *Broderick* v. *Rosner*, 294 U. S. 629, 642, 644, New Jersey had a statute which barred entertainment of actions for super-added liability of bank stockholders in New Jersey unless all creditors and stockholders were joined as necessary parties. This Court held that the impediments

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in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship, and must be allowed by each state to the citizens of all other states to the precise extent that it is allowed to its own citizens. Equality of treatment in this respect is not left to depend upon comity within the states, but is granted and protected by the Federal Constitution."

[11] The reason for the word "general" in the quotation above was that the Mexican statute permitting recovery provided such an indefinite measure of damages that it was impossible to compute them in awarding a money judgment, the only remedy afforded in such actions under Texas law.

imposed by the New Jersey statute were tantamount to an absolute bar of jurisdiction; that a State may deny jurisdiction only within a narrow area; and if such denial bars actions not counter to the justified public policy of the State, then such a denial is in violation of the full faith and credit clause. It was stated, Mr. Justice Brandeis speaking for the Court, p. 644:

> "Obviously, recognition could not be accorded to a local policy of New Jersey, *if there really were one,* of enabling residents of the State to escape from the performance of a voluntarily assumed statutory obligation, *consistent with morality,* to contribute to the payment of the depositors of a bank of another State of which they were stockholders." (Italics ours.)

The reasoning and authorities appearing on pages 642 and 643 of that decision are conclusive of the issues here.

Conflicts between the laws of the forum and those where the cause of action was created were involved in *Home Insurance Co.* v. *Dick,* 281 U. S. 397, 409; *Hartford Ins. Co.* v. *Delta Co.,* 292 U. S. 143, 149; *John Hancock Mut. L. I. Co.* v. *Yates,* 299 U. S. 178, 183; and *Order of Travelers* v. *Wolfe,* 331 U. S. 586, 589. In each of them the governmental interest or policy of the forum appears to have been far stronger than that of Illinois against actions for foreign deaths. Yet in each of these cases this Court held that denial of recognition to the statutes of the foreign state was a violation of the full faith and credit clause.

Illinois can have no justifiable governmental interest or policy against foreign actions for wrongful death so strong that recognition of such actions would infringe its right of sovereignty , its internal right of regulation in that area, when the very statute expressive of that policy, in fostering the domestic affairs of the State, creates and recognizes such an action! Even if the bar were imposed where Illi-

nois law was otherwise silent on its domestic attitude to actions for wrongful death, it is doubtful if such a bar could be upheld under the full faith and credit clause, because certainly recovery in such cases is consistent with morality and natural justice and without prejudice to the general interest of Illinois' citizens.[12] *C. & E. I. R. R. Co.* v. *Rouse,* 178 Ill. 132, 139. But when domestic policy approves such actions, then there can be no justifiable policy against those created elsewhere.

Here Illinois has expressed its domestic policy in favor of actions for wrongful death occurring within its borders. It has created such actions and permits access to its courts for their enforcement. Under the tests of justifiable policy discussed above this is conclusive. To say that it is not against Illinois policy to permit recovery for a fatal accident in Calumet City, Moline, Cairo, or East St. Louis, but that it is to withhold recovery for such an accident in Hammond, Davenport, Paducah or St. Louis, is a clear violation of the full faith and credit clause of the Federal Constitution. The Constitution certainly does not permit discrimination between identical actions created by the laws of Indiana, Iowa, Kentucky, Missouri, or of Utah, on the one hand, and of Illinois, on the other.

III.

The District Court below had power under Section 1406 (a) of Title 28 U. S. C. A. to transfer this case to the Federal Court in Utah.

1. An alternative motion was made in the District Court below to transfer this case to the District Court in Utah under Section 1406 (a), 28 U. S. C. A. (R. 21, 22).

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12 Nelson was a resident and citizen of Illinois (R. 3).

That section provides:

> "The district court of a district in which is filed a case laying venue in the wrong division or district shall * * *, if it be in the interest of justice, transfer such case to any district or division in which it could have been brought."

This alternative motion to transfer was denied below, the District Court finding *that venue was properly laid,* and since it was, Section 1406 (a) conferred no power to transfer the case; but, in any event, since there was no, jurisdiction to entertain the suit, there was nothing before the Court to transfer (R. 23).

Section 1406 (a) has been construed to permit transfer of a case brought in the wrong district to the proper district, even after the statute of limitations had run. *Orr* v. *U. S.,* 174 Fed. (2nd) 577 (C. C. A. 2, 1949). That was an admiralty action. Venue was limited to the residence of the libelant or to that in which the ship was located. The action was instituted in a Federal Court where neither of these requisites existed, and the Government raised the question in appropriate fashion.

This decision was followed by another to the same effect in *Untersinger* v. *U. S.,* 181, Fed. 2nd 953 (C. C. A. 2, 1950).

Both decisions held that the statute was remedial, and should have a liberal construction to prevent injustice.

2. If the District Court in Illinois has no jurisdiction because of the Illinois statute (which of course we do not concede), but other Federal Districts Court do have, does Section 1406 (a) vest the Federal Court in Illinois with power to make a transfer to one having jurisdiction?

We submit the answer to this question is supplied by the decision of this Court in *Herb* v. *Pitcairn,* 325 U. S. 77, 392 Ill. 38. There an action based on the Federal Employ-

ers' Liability Act was instituted in a city court. The Illinois Supreme Court held that the city court had no jurisdiction of the cause of action. Illinois law provided machinery for a transfer from the city court to the Circuit Court. After the Statute of Limitations had run under the Federal Act, a motion was made for its transfer. The Illinois Supreme Court held that a suit never had been filed, since it was filed in a court lacking jurisdiction, and that the limitation period provided by Federal law had not been satisfied at the time the case was first docketed in the Circuit Court. This Court held that even though the city court lacked jurisdiction, nevertheless the statute of limitations was satisfied by the filing of the action and the bringing in of the defendant by service of process, where there was machinery provided for transfer of the cause to a tribunal having jurisdiction to try it.

In this case Section 1406 (a) provides the machniery whereby the cause can be transferred to a court capable of hearing it. Suit was instituted, the defendant was brought in by service of process, and issue was joined. *Herb* v. *Pitcairn* is authority for its transfer to Utah. The statute of limitations provided by Utah is satisfied by the service of process and joinder of issue in the Federal Court in Illinois.

3. If we are wrong on our contention under full faith and credit (which again we do not concede), nevertheless there is no question but that the District Court had power to hear and entertain this suit. If Illinois policy supplies a defense to the suit, this goes to *duty* and not the *power*, as Justice Holmes so clearly pointed out in *Fauntleroy* v. *Lum*, 210 U. S. 230, 234, 235. Under such circumstances, Illinois would be an improper venue, because of the peculiar local policy expressed by the Illinois statute. Under such

circumstances, Section 1406 (a) supplies a means to transfer the case to a proper venue.

4. If we are wrong in the contentions raised by Points I and II of this brief, the result will deny to petitioner substantial damages for the benefit of the bereaved widow and children of decedent. We realize such result does not provide a legal argument in favor of transfer. But undoubtedly thousands of deserving litigants whose actions are now pending before Federal Courts would likewise be denied recourse, if we are wrong on those contentions. And that result certainly furnishes proper motive to search for some machinery or procedure to obviate the injustice.

The construction of Section 1406 (a) as placed on it by the Second Circuit shows that it is a remedial statute to prevent such an injustice. The phraseology of the statute is not technical. Its broad intent is to permit transfer where the suit was instituted in the wrong place. It supplies machinery whereby this and other like cases can be transferred to a proper venue "in the interest of justice".

Conclusion.

For the reasons outlined above in this brief in support of the Petition for Writ of Certiorari herein, we respectfully submit that the Writ should be issued by this Court.

Respectfully submitted,

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APPENDIX.

THE UTAH WRONGFUL DEATH STATUTE; Section 104-3-11-UCA 1943;

Except as provided in Chapter 1, of Title 42,[1] when the death of a person not a minor is caused by the wrongful act or neglect of another, his heirs, or his personal representatives for the benefit of his heirs, may maintain an action for damages against the person causing the death, or if such person is employed by another person who is responsible for his conduct, then also against such other person. If such adult person has a guardian at the time of his death, only one action can be maintained for the injury to or death of such person and such action may be brought by either the personal representatives of such adult deceased person, for the benefit of his heirs, or by such guardian for the benefit of the heirs as provided in the next preceding section. In every action under this and the next preceding section [2] such damages may be given as under all the circumstances of the case may be just.

[1] This Chapter contains the workmen's compensation laws of the State of Utah.

[2] Section 104-3-10 UCA-1943 which gives a cause of action to parents of a minor child who has been injured or killed by the wrongful act or neglect of another.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 558

FIRST NATIONAL BANK OF CHICAGO, AS EXECUTOR OF THE ESTATE OF JOHN LOUIS NELSON, DECEASED,
Petitioner,

vs.

UNITED AIR LINES, INC., A CORPORATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI.

JURISDICTION.

Petitioner has failed to show why it is important that this Court should exercise its extraordinary emergency power to issue a writ of certiorari *before judgment* in the Court of Appeals. The case is pending in that court and no questions of such gravity or importance are involved as to require this Court to settle them in advance of action by that court. This is simply an action for wrongful death. The issues raised can have no far-reaching effect even in automobile or airplane cases because only one other state (Wisconsin) has a statute even remotely similar to that portion of the Illinois statute here involved.

There is no conflict of decision; nor will the public interest be promoted by prompt settlement in this Court of the questions involved (Rules 38, 39).

As grounds for the granting of this petition, petitioner charges that the Court of Appeals has, in the past, misapplied the doctrine of *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, and will probably do so again in this case, and also that this case involves a question of full faith and credit under the Constitution on which this Court should pass (petition, p. 6). Manifestly, neither of these grounds presents any emergency. If, after adjudicating this case, the Court of Appeals commits any error then it will be time enough for this Court to grant a petition for writ of certiorari if it sees fit.

The third ground advanced for the granting of this petition, involving the ruling of the District Court in refusing to transfer the case to Utah under Section 1406(a) of the Judicial Code, presents a narrow procedural question which cannot possibly have any far-reaching effect and which the Court of Appeals is fully competent to decide.

The authorities relied on by petitioner (petition, p. 4) are inapposite. *Forsyth* v. *Hammond,* 166 U. S. 506, 513, was concerned with a conflict of decision between the supreme court of a state and the court of appeals; *The Three Friends,* 166 U. S. 1, with the relations of the United States to a foreign country; *American Construction Co.* v. *Jacksonville,* 148 U. S. 372, 385, with a trial judge sitting in the same case on appeal; *St. Louis, K. C. & C. R. R. Co.* v. *W. R. R. Co.,* 217 U. S. 247, 251, with the use of railroad tracks and terminal facilities in a large city; and *Gay* v. *Ruff,* 292 U. S. 25, 30, with the right of removal to the federal courts by a receiver appointed by a federal court.

No such questions are present here. This Court should decline to exercise its jurisdiction.

QUESTIONS PRESENTED.

In addition to the above question as to petitioner's failure to show any necessity for this Court to exercise jurisdiction in advance of decision by the Court of Appeals, the following questions are also involved:

1. In a diversity suit, does not the doctrine of *Erie R. Co.* v. *Tompkins,* without violating Article III of the Federal Constitution, require the Federal courts in Illinois to recognize the public policy of Illinois, as expressed in its statute?

2. May not Illinois, without violating the full faith and credit clause of the Federal Constitution, establish a public policy prohibiting suits in Illinois on foreign death statutes in those cases where the defendant can be served in the foreign state?

3. Was not a transfer to Utah under Section 1406(a) of the Judicial Code correctly denied for two reasons: first, the action was not brought in the wrong venue; and, second, the court did not have jurisdiction of the subject matter in any event?

STATUTE INVOLVED.

The Illinois Injuries Act as it existed at the time of the filing of this suit in 1948 is set forth in Appendix A at the end of this Brief. Since then, Section 2 has been amended in matters not here material (Illinois Revised Statutes, 1949, Chapter 70, Section 2. Laws of Illinois 1949, p. 1029). The part of Section 2 here important (unchanged since its enactment in 1935) provides as follows:

> "Provided, further, that no action shall be brought or prosecuted in this State to recover damages for a death occurring outside of this State where a right of action for such death exists under the laws of the place where such death occurred and service of process in such suit may be had upon the defendant in such place."

STATEMENT.

Petitioner's decedent was killed in an airplane crash in Utah in 1947 while a passenger aboard respondent's DC-6 airliner. Petitioner, as executor, brought suit in the District Court in Illinois under the Utah Death Statute (Sec. 104-3-11 Utah Code Ann. 1943) against respondent (R. 3, 4; petition p. 2).

As one of its defenses respondent pleaded the above quoted portion of Section 2 of the Illinois Injuries Act and the fact that respondent was qualified to do business in Utah and had registered agents there available for service of process (R. 10). In April, 1950, petitioner moved to strike this defense on the ground that this statute could not limit the jurisdiction of the federal courts (R. 11).

In July, 1950, the Court of Appeals for the Seventh Circuit decided *Trust Company of Chicago* v. *Pennsylvania*

Railroad Co., 183 F. 2d 640, in which the court held that the decisions of this Court in *Ragan* v. *Merchants Transfer & Warehouse Co.*, 337 U. S. 530, *Woods* v. *Interstate Realty Co.*, 337 U. S. 535, and *Cohen* v. *Beneficial Loan Corp.*, 337 U. S. 541, made it abundantly clear that in diversity cases the above Illinois statute closing the Illinois courts to certain foreign death actions also closed the federal courts in Illinois. Subsequently, in October, 1950, in *Munch* v. *United Air Lines*, a case involving the same accident in which petitioner here met his death, 184 F. 2d 630, the Court of Appeals again upheld the applicability of the Illinois statute under the doctrine of *Erie R. Co.* v. *Tompkins*.

Petitioner then twice amended its motion to strike to raise the constitutional questions here attempted to be presented (the claimed violations of Article III and the full faith and credit clause) (R. 13, R. 19). Each motion to strike was accompanied by an alternative motion to transfer the cause to Utah (R. 12, 15, 21).

The District Court denied both the motion to strike and the motion to transfer and entered judgment for the defendant (R. 22-24).

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ARGUMENT.

Petitioner has not shown the need for by-passing the Court of Appeals. No questions so grave or important that they require immediate action by this Court are presented.

Further, the district court's decision was correct—under the doctrine of *Erie R. Co.* v. *Tompkins* the Illinois Injuries Act prevents petitioner from suing in the federal courts in Illinois where the only ground of federal jurisdiction is diversity of citizenship. Article III of the Federal Constitution is not thereby violated. Nor does the Illinois statute, unequivocally stating the fixed public policy of Illinois, violate the full faith and credit clause.

Finally, a transfer to Utah was correctly refused.

I.

This Court Should Not Grant Certiorari Before Judgment.

As stated above (p. 1) petitioner has shown no pressing need in matters of grave importance for action by this Court before judgment in the Court of Appeals. Jurisdiction, therefore, should be declined (*Forsyth* v. *Hammond,* 166 U. S. 506, 513-515).

II.

Section 2 of the Illinois Injuries Act Does Not Violate Article III of the Federal Constitution.

Article III of the Federal Constitution is not violated:

1. Diversity jurisdiction is not derived from the Constitution, but from the Acts of Congress (*Kline* v. *Burke Construction Co.,* 260 U. S. 226, 233-234).

2. Article III refers to "Controversies * * * between Citizens of different States." This presupposes a *controversy;* if there is *no* controversy (as here) there is no jurisdiction and no violation of Article III (*Cover* v. *Schwartz,* 133 F. 2d 541, 544 (C. A. 2), certiorari denied 319 U. S. 748, rehearing denied 319 U. S. 785). Illinois, therefore, has not attempted to limit federal jurisdiction, but has removed its *source* by denying the existence of the *res* itself (*i. e.,* the existence of the controversy) and there is nothing to which jurisdiction may attach. In essence this was the holding of *Angel* v. *Bullington,* 330 U. S. 183, where this Court applied, in the Federal courts, a state statute prohibiting a deficiency judgment.

3. The Illinois statute does not impair federal jurisdiction. In *Trust Company of Chicago* v. *Pennsylvania Railroad Co.,* 183 F. 2d 640 (C. A. 7), the court said at page 644:

> "Nor do we think this means that the state statute has impaired the federal jurisdiction. Federal diversity jurisdiction, created by the Congressional act, as interpreted by the Supreme Court, is limited in the absence of other grounds for jurisdiction, to cases which the state court might entertain. In other words, implicit in the diversity statute, is the limitation resulting from the Supreme Court's interpretation of diversity jurisdiction. If, as the court says, the federal court, sitting in diversity cases, is only another court enforcing the remedies cognizable by the state court, the limitation upon diversity jurisdiction is inherent in the act creating Federal jurisdiction solely upon the accident of diversity. No new remedies are created by the statute; it merely lodges in another court the authority to enforce remedies cognizable in the state court. The federal court by congressional intent, as the Supreme Court rules, is just the same as that of the state court (provided diversity exists), no more and no less. If, as has been suggested, diversity jurisdiction has been limited, that limitation arises not from action of the state but exists inherently in the federal statute itself as authoritatively interpreted."

The doctrine of *Erie R. Co.* v. *Tompkins* was correctly applied:

The Court of Appeals in *Trust Company of Chicago* v. *Pennsylvania Railroad Co.*, 183 F. 2d 640, and *Munch* v. *United Air Lines*, 184 F. 2d 630, held that under the doctrine of *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, the proviso of Section 2 of the Illinois Act prevented the plaintiffs from suing in the federal courts in Illinois where the only ground of federal jurisdiction was diversity of citizenship. Respondent believes that it correctly so held and that no other decision is consistent with *Guaranty Trust Co.* v. *York*, 326 U. S. 99; *Angel* v. *Bullington*, 330 U. S. 183; *Woods* v. *Interstate Realty Co.*, 337 U. S. 535; *Cohen* v. *Beneficial Loan Corp.*, 337 U. S. 541; *Ragan* v. *Merchants Transfer & Warehouse Co.*, 337 U. S. 530, rehearing denied 338 U. S. 839.

These decisions clearly show that they do not rest on any question of terminology; supposed differences between substance or procedure or between substantive rights or remedial rights or between a defense or a substantive bar (petition, p. 19) are not the controlling factor. The paramount consideration is that in diversity cases litigants should have only such rights as they would have in the state courts in the same state. If the state courts are closed so also are the Federal courts. In *Ragan* v. *Merchants Transfer & Warehouse Co.*, 337 U. S. 530, this Court succinctly expressed the essence of the doctrine of *Erie R. Co.* v. *Tompkins* at page 532:

> "*Erie R. Co.* v. *Tompkins*, 304 U. S. 64, was premised on the theory that in diversity cases the rights enjoyed under local law should not vary because enforcement of those rights was sought in the federal court rather than in the state court. If recovery could not be had in the state court, it should be denied

in the federal court. Otherwise, those authorized to invoke the diversity jurisdiction would gain advantages over those confined to state courts."

Under petitioner's argument (petition, p. 7), the doctrine of *Erie R. Co.* v. *Tompkins* (applying only in diversity cases) could never have any effect, because every question, according to petitioner, would be a federal question.

The District Court correctly held that Article III was not violated.

III.

The Illinois Statute Does Not Violate the Full Faith and Credit Clause of the Federal Constitution.

Petitioner here is suing on the statute of Utah. It is well settled that rights given by foreign statute will not be enforced in another state where they offend the statutes or public policy of the forum (*Texas & Pacific R. R. Co.* v. *Cox,* 145 U. S. 593, 605; *Stewart* v. *Baltimore & Ohio R. R. Co.,* 168 U. S. 445, 448; *Indemnity Insurance Co. of North America* v. *Pan American Airways,* 57 F. Supp. 980, 981 (D.C., N.Y.); *Loucks* v. *Standard Oil Co.,* 224 N. Y. 99, 120 N. E. 198, 200, and cases therein cited; *State ex rel. Bossung* v. *District Court,* 140 Minn. 494, 168 N. W. 589, 590; Restatement of the Law, Conflict of Laws, Section 612).

In *Griffin* v. *McCoach,* 313 U. S. 498, this Court said at page 507:

> "* * * Where this Court has required the state of the forum to apply the foreign law under the full faith and credit clause or under the Fourteenth Amendment, it has recognized that a state is not required to enforce a law obnoxious to its public policy. *Bradford Electric Co.* v. *Clapper,* 286 U. S. 145, 160, 161; *Hartford Indemnity Co.* v. *Delta Co.,* 292 U. S. 143, 150."

Further, the sovereign, in its discretion, may refuse to aid the foreign right (Mr. Justice Cardozo, in *Loucks* v. *Standard Oil Co.*, 224 N. Y. 99, 120 N. E. 198, at 202).

The public policy of the State of Illinois is clearly and unambiguously expressed:

> "Provided, further, that no action shall be brought or prosecuted in this State to recover damages for a death occurring outside of this State where a right of action for such death exists under the laws of the place where such death occurred and service of process in such suit may be had upon the defendant in such place."

That policy is not a prohibition against *all* foreign death actions, but only against those where there is a right of action in the foreign state and the defendant can be there served. In other words, Illinois has refused not only to become an asylum for those seeking to avoid their just obligations, but it has equally refused to become a magnet drawing to itself wrongful death actions from all over the Union. The fact is that the party injured by the wrongful death always has a remedy.

This refusal by Illinois to be an asylum significantly differentiates the Illinois statute from the Wisconsin statute which is attacked in *Hughes* v. *Fetter*, Docket No. 355, as violative of the full faith and credit clause.

When the proviso was initially added in 1903 (Laws of Illinois 1903, p. 217), it prohibited all foreign death actions. In 1935, however, the proviso was amended to its present form set out above (Laws of Illinois 1935, p. 916).

The Supreme Court of Illinois has recognized that the statute states the public policy of Illinois (*Dougherty* v. *American McKenna Co.*, 255 Ill. 369, at 372). In that case, the 1903 statute was held not to violate the full faith and credit clause.

Under the doctrine of *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, the federal courts in diversity cases in Illinois are required to honor the stated public policy of Illinois (*Indemnity Insurance Co. of North America* v. *Pan American Airways,* 57 F. Supp. 980, 981 (D. C., N. Y.)).

Further, in interpreting the full faith and credit clause, this Court has repeatedly insisted that it would weigh all the interests of each state involved before holding that the full faith and credit clause qualified one state's power to govern its own affairs. In *Alaska Packers Assn.* v. *Industrial Accident Comm.,* 294 U. S. 532, this Court refused to give effect to an Alaska statute in a proceeding in California. The Court said at page 547:

> "* * * the conflict is to be resolved, not by giving automatic effect to the full faith and credit clause, compelling the courts of each state to subordinate its own statutes to those of the other, but by appraising the governmental interests of each jurisdiction, and turning the scale of decision according to their weight."

The public policy of Illinois in this case, as expressed in its statute, clearly outweighs the interest of Utah and the other states of the Union for the following reasons:

Those to whom a foreign statute gives a right of action can obtain redress in the state where the cause accrued if service of process can be had upon the defendant. But in the event that a person liable is not subject to service in that state, but can be found in Illinois, then suit can be commenced there. Thus Illinois has refused to become a refuge for those attempting to escape their just obligations.

The legislature of Illinois also undoubtedly had in mind the difficulties and hardships involved in compelling witnesses, who in all probability would reside in the state

where the accident occurred, to come to Illinois to testify. Other important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive.

Too, Illinois is vitally interested in preventing the administrative difficulties which arise in its courts when litigation is piled up in congested centers, instead of being handled at the place of origin, and in providing relief from the unjust tax burdens and the burden of jury duty imposed upon its residents when foreign cases are imported into its courts. Further, Illinois is naturally interested in preserving to its citizens reasonable access to its already overcrowded courts.

Considerations such as these were considered important and controlling by this Court in upholding the right of states to deny to non-residents access to their "often overcrowded courts" in actions under the Federal Employers' Liability Act (*Missouri ex rel. Southern Railway* v. *Mayfield,* 340 U. S. 1, 4; *Douglas* v. *New York, New Haven & Hartford R. R. Co.,* 279 U. S. 377).

Broderick v. *Rosner,* 294 U. S. 629 (brief, p. 26) is distinguishable from the case at bar. The statute there involved was not a death statute. The statutory liability sought to be enforced was contractual in character. The right here relied on is a statutory tort liability and did not exist at common law. No one has a vested right in a death action and a legislature can entirely abolish the right (*Wall* v. *Chesapeake & Ohio Ry. Co.,* 290 Ill. 227, at 232). In addition, the New Jersey statute in that case amounted to a complete prohibition. Not so here.

The cases cited (brief, p. 27) are likewise not in point. None is a tort case. All are concerned with contract rights.

The Illinois statute does not violate the full faith and credit clause.

IV.

Section 1406(a) of the Judicial Code Does Not Empower the District Court to Transfer This Cause.

The District Court likewise correctly denied petitioner's alternative motion to transfer this cause to the District Court of Utah under Section 1406(a) of the Judicial Code (Title 28, United States Code, Section 1406(a)) (R. 23). That section provides:

> "(a) The district court of a district in which is filed a case *laying venue in the wrong division or district* shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought." (Emphasis supplied.)

It will be noted that this section applies only when there is wrong venue. Here the venue was correct under Section 1391(a) of the Judicial Code (Title 28, United States Code, Section 1391(c)). Respondent was doing business in Illinois. Venue being proper, Section 1406(a) therefore has no application.

Trust Company of Chicago v. *Pennsylvania Railroad Company,* 183 F. 2d 640, 646, holds Section 1406(a) inapplicable. There, as here, suit had not been brought in the wrong venue.

In addition, Section 1406(a) has no application unless the Court has jurisdiction.

In *Orr* v. *United States,* 174 F. 2d 577 (C. A. 2), relied on by petitioner, the Court said at page 580:

> "The Reviser's Note to Section 1406(a) says that that section 'provides statutory sanction for transfer

> instead of dismissal, where venue is improperly laid.' This comment on the scope of Section 1406(a) seems to point directly to the elimination of the bar of the statute of limitations in cases *where jurisdiction exists* and there is nothing to prevent its exercise but the lack of proper venue." (Emphasis supplied.)

There is a vast difference between jurisdiction and venue (*Neirbo Co.* v. *Bethlehem Shipbuilding Corp.*, 308 U. S. 165, 167-168; Moore's Commentary on the U. S. Judicial Code, pages 172-173). Lack of jurisdiction of subject matter is fatal and can be raised at any time (*Green* v. *Obergfell*, 121 F. 2d 46, 54-55 (C. A., D. C.), certiorari denied 314 U. S. 637).

Herb v. *Pitcairn*, 325 U. S. 77, is no authority for a transfer in this case. In that case this Court merely held that the statute of limitations of the Federal Employers' Liability Act had been satisfied; it decided nothing as to a transfer even under the Illinois practice. More important, no question was raised, and consequently none was decided, as to federal transfer procedure. As shown above, no transfer can be made under Section 1406(a) unless the court initially has jurisdiction. There is no such jurisdiction here.

Conclusion.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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APPENDIX A.

Illinois Revised Statutes (1947), Chapter 70:

Wrongful Death.

An Act requiring compensation for causing death by wrongful act, neglect or default. (Approved February 12, 1853. L. 1853, p. 97.)

1. Killing—Action survives) Sec. 1. Be it enacted by the People of the State of Illinois, represented in the General Assembly: Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who or company or corporation which would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.

2. Action—By whom Brought—Limit of Damages—Death outside State.) Sec. 2. Every such action shall be brought by and in the names of the personal representatives of such deceased person, and the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate and in every such action the jury may give such damages as they shall deem a fair and just compensation with reference to the pecuniary injuries resulting from such death,

to the wife and next of kin of such deceased person, not exceeding the sum of $15,000: Provided, that every such action shall be commenced within one year after the death of such person. Provided, further, that no action shall be brought or prosecuted in this State to recover damages for a death occurring outside of this State where a right of action for such death exists under the laws of the place where such death occurred and service of process in such suit may be had upon the defendant in such place.

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